> nature of a distinct negative stipulation is necessary before an injunction can issue restraining the defendant from acting contrary to the term.

In *Pertama Cabaret Nite Club Sdn Bhd* v *Roman Tam*[6] the Federal Court considered cl 15 of the agreement in case of breach or misconduct of the singer and found there was indeed side by side with the stipulation to sing in the appellant's night club for a few days also an undertaking by the singer not to sing elsewhere for a certain period. In *Lumley* v *Wagner*[9] too the contract also contained both positive and negative stipulations, the negative stipulation being that the defendant was not to sing for anyone else during the agreed period. The negative stipulation was 'superadded' said Lord St Leonard LC although he was also of the opinion that 'even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered.' Also according to the learned Lord Chancellor the jurisdiction to restrain Johanna Wagner from the commission of an act which she had bound herself not to do 'is wholly within the power of the court, and being of the opinion that it is a proper case for interfering.'

When we speak of the implied stipulation a useful guideline can be found in *Whitwood Chemical Co* v *Hardman.*[10] There the manager of a manufacturing company agreed to give during a specific term 'the whole of his time to the company's business'. Lindley LJ described the principle at p 426:

> Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on ad infinitum; but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will.

It is to be noticed that in each of these cases the implied stipulation was against the employee, not the employer. In practice it may perhaps be much more difficult to find in a service contract an implied undertaking operating against an employer.

Returning to our case it is also to be noticed that s 128 of the Companies Act 1965 provides for removal of a director of a public company by ordinary resolution *notwithstanding* anything in the company's memorandum or in any agreement between the company and the director.

Our conclusion is that an implied stipulation cannot properly be read into the agreement between SPK and Dato' Abdullah Ahmad.

We accordingly allowed the appeal with costs. Immediately after our decision to allow the appeal Mr Ranjan withdrew the cross-appeal and the cross-appeal was accordingly dismissed but with no order as to costs.

Appeal allowed.

Solicitors: *KS Narayanan & Associates*; *PS Ranjan & Co.*

Reported by *Prof Ahmad Ibrahim*

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-454-89
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF SCJ AND WAN YAHYA J
29 OCTOBER 1990

Companies and Corporations — Winding-up — Insolvency of company — Company which fails to pay its debt — Prima facie right of creditor to petition for winding up — Discretion of court

In this case the appellant had presented a petition for the winding up of the respondent company. The respondent company had taken a loan from the American International Assurance Co Ltd, the repayment of which together with interest and costs was guaranteed by the appellant. The guarantee agreement between the respondent company and the appellant, inter alia, provided that if the guarantor notified the respondent company that AIA had required the guarantor to pay any part of the amount guaranteed the respondent company should forthwith on demand pay such amount to the guarantor notwithstanding that the sum called for might not have been properly due. AIA had demanded payment from the appellant of the sum of $33,323,593.91 pursuant to the guarantee. The appellant had demanded this sum from the respondent company but the respondent had failed or refused or neglected to pay the said sum. The petition for winding up also relied on the profit and loss account of the respondent company which showed that liabilities exceed assets and that the respondent company had incurred a loss, and also on just and equitable grounds that the company should be wound up. The respondent company filed a notice of motion seeking that the winding-up petition be set aside on the grounds that the petitioner was not entitled to present the petition and that the petition did not disclose a cause of action. The learned trial judge set aside the petition on the sole ground that in his view the petitioner had no locus standi to present the petition (see [1990] 1 MLJ 282). He stated that he was 'far from satisfied that the petitioner was at the material time qualified to petition the court as it did'. The learned judge took the view that the demand for payment was stage-managed and he also referred to a sharing formula agreed to by the creditors of the company which he regarded as a moratorium of the claims against the company.

The appellant appealed. It appeared that at the time of the appeal all the moneys due had been paid.

Held, allowing the appeal:
Prima facie a creditor is entitled to petition for a winding-up against a company which fails to pay its debts. The petition in this case should not have been struck out in limine and should have been heard on its merits. The appellant should not be prevented from pursuing its petition so that the court would be able to consider all the evidence and determine whether it should exercise its discretion to order a winding-up or not.

[Bahasa Malaysia summary

Di dalam kes ini perayu telah mengemukakan petisyen untuk penggulungan responden, sebuah syarikat. Responden telah berhutang dari International Assurance Co Ltd (AIA) dan pembayaran hutang bersama dengan bunga itu telah dijamin oleh perayu. Perjanjian jaminan antara responden dan perayu antara lain memperuntukkan bahawa jika penggerenti memberitahu kepada responden bahawa AIA telah meminta penggerenti itu membayar apa-apa bahagian amaun yang dijamin itu, responden akan terus membayar amaun itu kepada penggerenti, walaupun jumlah wang yang dituntut itu boleh jadi belum lagi harus dibayar. AIA telah menuntut dari perayu pembayaran wang $33,323,593.91 dibawah jaminan itu. Perayu pula telah mendakwa jumlah itu dari responden akan tetapi responden telah gagal atau enggan atau mengabaikan pembayarannya. Petisyen untuk penggulungan syarikat itu (responden) juga bergantung kepada akaun keuntungan dan kerugian responden yang menunjukkan liabiliti lebih dari aset dan responden telah mengalami kerugian dan juga kepada alasan-alasan adil dan kesaksama menunjukkan syarikat responden hendaklah digulungkan. Responden memfailkan notis usul memohon supaya petisyen penggulungan itu diketepikan atas alasan-alasan bahawa pempetisyen tidak berhak mengemukakan petisyen itu dan petisyen itu tidak menunjukkan apa-apa kuasa tindakan. Hakim yang arif telah mengenepikan petisyen atas alasan bahawa didalam pendapat beliau pempetisyen tidak mempunyai locus standi mengemukakan petisyen itu (sila lihat [1990] 1 MLJ 282). Beliau berkata bahawa beliau jauh dari berpuashati pempetisyen itu pada masa yang berkenaan berhak mengemukakan petisyen itu seperti yang ia mendakwa. Hakim yang arif berpendapat tuntutan pembayaran hutang itu telah sengaja dirancangkan dan beliau juga merujuk kepada perjanjian untuk cara pembahagian antara pemiutang-pemiutang syarikat itu yang beliau anggap sebagai cara penangguhan (moratorium) semua tuntutan terhadap syarikat itu (responden). Perayu telah membuat rayuan. Pada masa rayuan itu semua baki hutang itu telah dibayar.

Diputuskan, membenarkan rayuan itu:
Seorang pemiutang prima facienya berhak mempetisyen untuk penggulungan syarikat yang telah gagal membayar hutangnya. Petisyen didalam kes seharusnya tidak ditolak begitu sahaja dan hendak sebaik-baiknya didengar atas meritnya. Perayu tidak harus dihalang meneruskan petisyen itu supaya mahkamah dapat menimbang semua keterangan dan memutuskan samada ia akan menggunakan budibicaranya untuk memerintahkan penggulungan itu atau tidak.]

Cases referred to
1 *Re Sanpete's Builder(s) Pte Ltd* [1989] 1 MLJ 393 (folld)
2 *IOOC Australia Ltd* v *Mobil Australia Ltd* [1973] 49 ALJR 176 (refd)
3 *Re King's Cross Industrial Dwellings Co* (1870) 11 LR Eq 149 (folld)
4 *Re Great Britain Mutual Life Assurance Society* (1880) 16 Ch D 246 (folld)
5 *Re North Bucks Furniture Depositories Ltd* [1939] 2 ALL ER 549 (folld)
6 *Chip Yew Brick Works Sdn Bhd* v *Chang Hee Enterprise Sdn Bhd* [1988] 2 MLJ 447 (folld)

Appeal from: Companies Winding-Up No D1-42-577-87 (High Court, Kuala Lumpur)

G Sri Ram (Rosli Dahlan with him) for the appellant.
MS Murthi for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): On 10 December 1987 Morgan Guaranty Trust Co of New York ('the petitioner') presented a petition to have Lian Seng Properties Sdn Bhd ('the company') wound up. It was not disputed that the company had taken a loan of $30m from the American International Assurance Co Ltd ('AIA') the repayment of which together with interests and costs was guaranteed by the petitioner. The guarantee agreement between the company and the petitioner, inter alia, provided that if the guarantor notified the company that AIA had required the guarantor to pay any part of the amount guaranteed, the company should forthwith on demand pay such amount to the guarantor notwithstanding that the sum called for might not have been properly due.

It was also not disputed that there were other lenders of the company. The company's debts were secured in several other ways. One such security was a piece of land in Kuala Lumpur on which the respondent was constructing offices and apartments for sale to the general public.

Some time in April 1987 the lenders combined by entering into an agreement with the company to share among themselves the proceeds from the sales of the offices and apartments and they agreed on a common formula on the sharing to be done. The petitioner was not a party to the agreement. The lenders however reserved their rights under the instruments of lending.

The petition relied on a number of grounds. Firstly, it referred to cl 5 of the guarantee facility agreement dated 13 August 1984 that the company would unconditionally and irrevocably undertake to keep the petitioner fully indemnified in accordance with the guarantee facility agreement on all liabilities whatsoever incurred under or in connection with the agreement.

By a letter dated 23 September 1987, AIA demanded payment from the petitioner the sum of $33,323,593.91 pursuant to the guarantee. By a letter dated 9 November 1987 following the occurrence of a number of defaults as described in the said letter, the petitioner demanded from the company the said sum. The company failed or refused or neglected to pay the said sum.

The petition also reproduced the balance sheet of profit and loss of the company which showed that liabilities exceeded assets and that the company had incurred a loss of $11,811,100 as at 31 December 1986 as against a profit of $1,006,292 as at 31 December 1985. Finally the petition relied on just and equitable grounds that the company should be wound up.

On 15 April 1988, a contracting company, Pembinaan KSY Sdn Bhd gave notice of intention to support the petition. On 21 December 1988 the company filed a notice of motion seeking that the winding-up petition be set aside on the grounds that: (a) the petitioner was not entitled to present the petition; and (b) the petition did not disclose a cause of action.

The notice of motion was heard and on 26 October 1989 the learned judge set aside the petition on the sole ground that in his view the petitioner had no locus standi to present the petition. [See [1990] 1 MLJ 282.]

The learned judge stated in his judgment that he was 'far from satisfied that the petitioner was at the material time qualified to petition the court as it did' — p 20 of the appeal record.

There were many red herrings thrown in below and before us but the simplest approach in this appeal is to just answer the question whether on the facts of this case as were available to the learned judge as on the date of the petition the petition should be struck out in limine or should be heard. After hearing arguments and considering the facts we took the view that the petition should not have been struck out in limine and that it should have been heard on its merits. We accordingly allowed the appeal with costs here and below.

It would appear that the trial judge based his decision mainly on the construction of the company that the petitioner was not entitled to invoke cl 5.2 of the guarantee agreement as the demand was 'stage managed'. Indeed the letter dated 23 September 1987 from the solicitors to AIA stated that they were calling on the guarantee at the request of the petitioner and this was before the execution of the sharing formula agreement in which AIA was a party.

The learned judge also referred to the sharing formula agreement which he regarded as a moratorium in respect of the claims against the company and that this moratorium was terminated only subsequent to the date of filing of the petition. The sharing formula agreement was terminated on 2 February 1988.

There was also reference made to the suit in Singapore brought against the company by the petitioner with regard to the same amount some time before the presentation of the petition and that on the date of the petition the suit was pending as a contested action in the Singapore High Court.

Finally, it was submitted on behalf of the company that the appeal was academic because all moneys had already been paid and this was not disputed.

It would seem to us unarguable on the facts that the petitioner had on 10 December 1987, that is, the date of filing of the petitioner, a prima facie right of an unpaid creditor to file the petition. There was no evidence that the payment was 'stage managed' and even if it was, it would make no difference as: (a) the petitioner was in our view entitled to invoke cl 5.2 of the guarantee agreement; and (b) prima facie a creditor who is not paid has a right to file a petition for a winding-up order whatever may be his other motives.

See also *Re Sanpete Builders (S) Pte Ltd.*[1] It is not good law that only a creditor who feels goodwill towards his debtor is entitled to a winding-up order — *IOC Australia Ltd* v *Mobil Australia Ltd*[2] at p 182.

The sharing formula agreement cannot be read against the petitioner as the petitioner was not party to it.

As regards payment of all the moneys since then we are concerned only with the date of filing of the petition and not with events that happened subsequent to that.

The issue is whether on the date of filing of the petition the company was unable to pay its debts. If it is shown by some evidence that the company was unable to pay its debts then the fact that there is a civil suit on the same amount in another jurisdiction is neither here nor there. In any event the debt must be disputed on some substantial grounds: see *Re King's Cross Industrial Dwellings Co*[3] and *Re Great Britain Mutual Life Assurance Society*[4] where Jessel MR said at p 253:

> . . . in my opinion it is not sufficient for the respondents, upon a petition of this kind, to say 'we dispute the claim'. They must bring forward a prima facie case which satisfies the court that there is something which ought to be tried, either before the court itself, or in an action, or by some other proceeding.

There are many tests to be applied to see whether a petitioner for a winding-up order has locus standi. Insolvency is always a ground relied on in a petition. Prima facie an unpaid creditor is entitled to petition for a winding-up order against a company which fails to pay its debt. Macpherson says that the only test which seems capable of resolving all difficulties is that suggested by Crossman J in *Re North Bucks Furniture Depositories Ltd,*[5] namely, that the term 'creditor' 'includes every person who has the right to prove in winding-up'.

Looking at the grounds given in the petition in the instant case it is clear to us that the petition should not have been struck out in limine and should have been heard on its merits. This was the approach of this court in *Chip Yew Brick Works Sdn Bhd* v *Chang Hee Enterprise Sdn Bhd.*[6]

The appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding-up or not.

Relevant to this appeal is that part of the judgment in *Chip Yew Brick Works Sdn Bhd*[6] which appears at pp 448 and 449:

> Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

Appeal allowed

Solicitors: *Allen & Gledhill; Murthi & Partners.*

Reported by *Prof Ahmad Ibrahim*

Ker Chee Chuan v Katlyn Enterprise (M) Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-128 OF 1990
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF SCJ AND WAN YAHYA J
29 OCTOBER 1990

Land Law — Sale of land by public auction — Certificate of sale issued by senior assistant registrar — Purchaser registered as proprietor of land — Application to set aside default judgment and sale of land

Land Law — Caveat — Removal of — Whether title indefeasible — Failure to comply with requirements of Rules of the High Court 1980 and National Land Code 1965 — Rules of the High Court 1980, O 47 r 7 — National Land Code 1965, ss 217, 337 & 340

In this case as a result of a default judgment obtained by one Suppiah against the respondent for failure to pay the full purchase price of the land which had been sold to them by Suppiah, the land was auctioned and purchased by the appellant. A certificate of title had been issued by the senior assistant registrar of the High Court and the appellant had been registered as proprietor of the land. The respondent thereupon applied to set aside the default judgment and the sale of the land and they lodged a caveat against the land. The appellant applied to have the caveat removed. The learned Judicial Commissioner found that on the facts the respondent as caveator had discharged the onus establishing that the caveat should remain pending the disposal of the issues raised [see [1990] 2 MLJ 91].

Held, dismissing the appeal:

(1) It appeared that the provisions of the Rules of the High Court 1980 and of the National Land Code 1965 in relation to the sale in this case had not been followed and applied with and therefore the issue is contentious whether the auction sale of the land by the court is absolute.

(2) On the facts the learned Judicial Commissioner had exercised his discretion correctly as he was satisfied that the balance of convenience showed that it is better to maintain the status quo until trial of the action.

[Bahasa Malaysia summary

Di dalam kes ini berikutan daripada penghakiman ingkar yang diperolehi oleh seorang bernama Suppiah terhadap responden kerana kegagalannya membayar harga pembelian sepenuhnya bagi tanah yang ia telah menjual kepada Suppiah, tanah itu telah dilelong dan diberi oleh perayu. Perakuan hakmilik telah dikeluarkan oleh penolong kanan pendaftar Makamah Tinggi dan perayu telah didaftar sebagai tuanpunya berdaftar tanah itu. Responden kemudiannya telah memohon mengenepikan penghakiman ingkar dan penjualan tanah itu dan ia telah membuat kaveat terhadap tanah itu. Perayu pula telah memohon kaveat itu disingkirkan. Yang arif Pesuruhjaya Kehakiman telah berpendapat bahawa atas fakta kes itu responden sebagai pengkaveat telah menjelaskan beban menunjukan kaveat itu harus dikekalkan hingga keputusan issu-issu yang telah ditimbulkan.

Diputuskan, menolak rayuan itu:

(1) Nampaknya peruntukan-peruntukan Kaedah-Kaedah Mahkamah Tinggi 1980 dan Kanun Tanah Negara 1965 berhubung dengan penjualan tanah itu telah tidak dipatuhi dan digunakan didalam kes ini dan oleh kerana itu issu sama ada jualan lelong tanah itu telah menjadi muktamad boleh dipertikaikan.

(2) Atas fakta-fakta kes ini yang arif Pesuruhjaya Kehakiman telah menggunakan budibicaranya dengan sewajarnya oleh kerana beliau berpuashati imbangan kesesuaian menunjukkan adalah lebih baik status quo diteruskan hingga perbicaraan tindakan itu.]

Cases referred to

1 *Doshi* v *Yeoh Tiong Lay* [1975] 1 MLJ 85 (distd)
2 *Eng Mee Yong & Ors* v *V Letchumanan* [1979] 2 MLJ 212 (folld)

Legislation referred to

National Land Code 1965 ss 217, 337, 340
Rules of the High Court 1980 O 47 r 7

Appeal from: Originating Motion No 25-7-1989 (High Court, Muar)

G Sri Ram (Joseph Yeo and *C Subbayah* with him) for the appellant.
Ng Shew Hor for the respondent.

Cur Adv Vult

Mohamed Yusoff SCJ (delivering the judgment of the court): This appeal concerns the removal of caveat lodged against the land held under Grant No 10726 for Lot No 1379 situated in the mukim of Simpang Kanan, district of Batu Pahat in the state of Johore.

The appellant (caveatee) who sought the removal of the caveat had purchased the land on 14 July 1988 at an auction conducted by the High Court at Muar. The auction of the land had arisen from default judgment obtained by one Mr M Suppiah ('Suppiah') against the respondent (caveator) in Suit No 23-42-1987 for failure